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No. 87-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL MOTORS CORPORATION and
AMERICAN NATIONAL RED CROSS,
Petitioners,

v.

WILLIAM M. BENNETT, CONWAY H. COLLIS,
ERNEST J. DRONENBERG, JR., RICHARD NEVINS,
GRAY DAVIS, and BRUCE BUNNER,
Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents cannot deny the only fact determinative here: in purporting to tax the business of insurance, they calculate the amount subject to tax by reference to the benefit amounts paid from ERISA plans. To justify that reference to ERISA benefits in the calculation of the tax, respondents purport to rely on record "fact," but actually rely on nothing other than the theory they originally invented to justify the tax under *State* law.

Respondents argue that "it is the insured employees that are actually paying the premiums for their insurance coverage through their labor." Brief in Opposition to Petition for Writ of Certiorari ("Opposition

Brief") at 7-8. From this theoretical premise—which neither the District Court nor the Court of Appeals thought worthy of mention—respondents assert that it is the value of these "labor premiums" that they seek to tax. The ERISA benefits, respondents thus conclude, are used solely as a way to quantify the value of these "labor premiums."[1] *Id.* at 11-12. Respondents must admit, however, that petitioners' employees do not work for Metropolitan Life Insurance Company. Thus, even if the value subject to tax is presumed to flow from employee to employer as "labor premiums" rather than from employer to employee as ERISA benefits, the value is still not received in fact by the insurance company. Indeed, it was this total absence of any actual nexus between the insurer and the "labor premiums" that compelled the California Supreme Court to declare that all employer sponsors of ERISA plans "are to be treated as agents of Metropolitan" as a matter—not of fact—but of California law. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 51a.[2]

Similarly, respondents' attempt to convince the Court that their tax on ERISA benefits is "limited"

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[1] Respondents' theory erases the distinction, which the Court has recognized, between plans funded by employee contributions ("contributory plans") and plans funded by company assets ("noncontributory plans"). *See, e.g., International Brotherhood of Teamsters v. Daniel*, 439 U.S. 790, 793 (1979) ("noncontributory" plan found where "*employees paid nothing to the plan themselves*") (emphasis added). Respondents argue that the employees "paid" everything to the plan through their labor.

[2] Through the "agency" fiction, the State has transformed the plan into an extension of the insurance company and thus has accomplished precisely what Congress sought to foreclose by enacting the "deemer clause." 29 U.S.C. § 1144(b)(2)(B).

only to cases in which the benefits are "insured." Opposition Brief at 9. Indeed, it is fair to say that respondents' defense of their tax in this Court is grounded on the premise that the benefits upon which their tax is imposed are fully "insured" benefits. The District Court squarely held, however, that the insurance companies were *not* responsible, under the excess-risk arrangement, for benefits below the "trigger point." Pet. App. at 17a (petitioners "remain responsible for payment of all benefits from their respective plans below a trigger point"). The Court of Appeals agreed. *Id.* at 6a (petitioners "are responsible for paying all claims up to a trigger point").[3]

Moreover, whereas ERISA recognizes a distinction between *plans* that are "fully insured" and those which are "not fully insured"[4], it draws no distinction, and none can workably be drawn, among benefits based on the degree to which an insurance carrier may or may not be primarily, secondarily, wholly, or conditionally liable for a given benefit. Thus, respondents' assertion that the Court of Appeals' decision hinges on the "insured" status of the benefits is not based on any factual finding or legal determination below. If the decision below does turn, as respondents argue, on the Court of Appeals' implicit deference to the State's characterization of the benefits as "insured," then review is warranted to establish that such deference to state characterizations

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[3] Respondents' assertion that the "record" in this case establishes the "insured" status of the pre-trigger benefits is all the more remarkable because they appear simultaneously to contend that the "record" proves that there is no "insurance" risk below the "trigger point." Opposition Brief at 8.

[4] *See* 29 U.S.C. § 1144(b)(6)(A).

of ERISA benefits is antithetical to ERISA's preemption of state law.

Finally, respondents attempt to minimize their inclusion of benefits in the basis of the tax by characterizing it as a mere "arithmetical reference" for "purely computational purposes." Opposition Brief at 5, 6. As Justice Blackmun recognized, however, in *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983), the "practical impact" of a tax computed by reference to an amount "is indistinguishable from that of a tax imposed directly on" that amount. *Id.* at 862.

The practical impact here is severe. Respondents have estimated that the State of California alone stands to gain $200 million to $300 million from back "labor premium" taxes. R. Finlayson, "California Court Levies Tax on Self-Funded Plan," *Business Insurance*, June 8, 1987, at 1, col. 1. Insurance companies have provided excess-risk insurance to plans in California only under the condition that the plans reimburse them for the full cost of a tax imposed on "labor premiums," which they never receive. Because there is no reason to believe that other states will fail to follow California's example, the cost of employer-sponsored health care will increase staggeringly as a consequence of the decision below to the detriment of employees, their dependents, and, most relevant here, the federal interest Congress sought to protect through its enactment of section 514 of ERISA.[5]

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[5] Respondents claim that *Fort Halifax Packing Co., Inc. v. Coyne*, 107 S. Ct. 2211 (1987), demonstrates that "the pre-emption clause is not applicable in this case." Opposition Brief at

CONCLUSION

In the guise of factual presentation, respondents reassert a theory of taxation upheld by the California Supreme Court in a 4-3 decision reversing the lower California courts. That theory serves to make all ERISA benefit activity tantamount to the business of insurance. Plan participants are "insureds," plan sponsors are "insurance agents," and plan benefits are "gross premiums" because they express the value of the "insureds'" "labor premiums." In the words of the California Supreme Court's dissenting opinion: "Article XIII, section 28 of the California Constitution imposes a tax on (1) gross *premium*, (2) *received* by (3) an *insurer*. The majority imposes this tax on (1) *losses* (2) *paid* to (3) *doctors and hospitals* and the like. What went wrong?" Pet. App. at 55a.

The same question, with the same tone of incredulity, applies to the decision of the Court of Appeals. ERISA exempts from preemption laws that (1) regulate (2) insurance (3) other than the "insurance" inherent in the nature of the ERISA plan. 29 U.S.C. § 1144(b)(2). The Court of Appeals applied the exemption to save a law that (1) taxes (2) ERISA ben-

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18. *Fort Halifax*, however, merely held that a state law requiring a one-time, lump-sum, plant-closing severance payment did not thereby require the employer to establich an ERISA plan or otherwise "relate to any employee benefit plan." Nothing in *Fort Halifax* ever arguably supports respondents' silly argument that their tax is not preempted because it "relates" only to ERISA benefits and not to the ERISA plans providing those benefits.

Similarly without merit are respondents' standing and Tax Injunction Act arguments, which both the District Court and the Court of Appeals soundly rejected. Pet. App. at 7a-10a; 19a-20a.

efits (3) on the theory that such benefits entail an inherent cost of "insurance." What went wrong? Unless this Court answers that question, an intentionally narrow exception to the rule of preemption will have become the means for the unrestrained state taxation of plan assets.

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Respectfully submitted,

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